

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAM MICHAEL HEIDGER,

Defendant-Appellant.

UNPUBLISHED

January 24, 2003

No. 236862

Midland Circuit Court

LC No. 01-009798-FH

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of breaking and entering a building with intent to commit larceny, MCL 750.110, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial the evidence showed that during the early morning hours of February 24, 2001 a break-in occurred at Don's Video Store in Midland County. Instant lottery tickets and cigarettes were taken from the store. Computer printouts generated by the Bureau of State Lottery showed that thirty-two winning instant tickets originally issued to Don's Video Store were redeemed at five different locations in Saginaw between 6:05 a.m. and 6:33 a.m. on February 24, 2001. Various persons viewed surveillance tapes made at the stores at which the lottery tickets were redeemed and identified defendant as the person who was redeeming the tickets. The investigating officer testified that defendant waived his *Miranda*¹ rights and made a statement in which he denied that he broke into Don's Video Store. When told that several witnesses had identified him as the person shown on the surveillance videos redeeming lottery tickets, defendant stated that he hoped that the witnesses were mistaken. The jury viewed the surveillance videos in which defendant appeared.

Defendant's mother testified that defendant was at home on the evening of February 23, 2001 and the morning of February 24, 2001. Defendant testified and denied breaking into Don's Video Store or stealing lottery tickets from the store. He stated that early in the morning on February 24, 2001 he went to Saginaw to buy cocaine, and that he purchased the lottery tickets from an associate of his dealer. Over an objection, defendant maintained in response to the

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

prosecutor's question that he did not tell the investigating officer that he bought the lottery tickets in Saginaw because he did not want to get into trouble for having what could be stolen property in his possession. The jury found defendant guilty of the charged offense.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portions of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Generally, we review a claim of prosecutorial misconduct de novo, and review the trial court's findings of fact for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant argues that the trial court erred by failing to sustain his objection to the prosecutor's improper questions regarding his failure to tell the investigating officer that he bought the lottery tickets in Saginaw. We disagree. If a defendant waives his right to remain silent, his failure to assert a defense subsequently claimed at trial may be addressed. *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999). Here, defendant waived his *Miranda* rights and made a statement. He denied committing the break-in at Don's Video Store; however, he did not assert the defense that he subsequently claimed at trial, i.e., that he bought the lottery tickets in Saginaw. Defendant did not exercise his right to remain silent when he was questioned; therefore, the prosecutor was entitled to question him regarding his failure to assert his defense at that time. *Avant, supra*. The trial court properly overruled defendant's objection to the line of questioning. *Watson, supra*.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600. Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that he was denied the effective assistance of counsel by counsel's failure to request a jury instruction on the offense of receiving or concealing stolen property, MCL 750.535, which is a cognate lesser included offense of breaking and entering a building with intent to commit larceny. *People v Adams*, 202 Mich App 385, 387; 509 NW2d 530 (1993).² We disagree. Defendant's assertion that a claim that venue was improper could have been waived constitutes an acknowledgment that under his theory of the case, venue on a charge of receiving or concealing stolen property would have been improper in Midland County.

² Our Supreme Court has recently held that the giving of an instruction on a cognate lesser included offense is prohibited. See *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). Defendant does not address this decision.

Nevertheless, it is likely that counsel also determined as a matter of trial strategy that he should not request an instruction on the lesser offense of receiving or concealing stolen property on the ground that if the jury believed defendant's version of the events, it would simply acquit defendant of the charged offense.

We do not second-guess counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that a strategy may not have worked does not mandate a conclusion that the strategy constituted ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The evidence showed that on February 24, 2001 a break-in occurred at Don's Video Store, and that instant lottery tickets were taken from the store. The evidence also showed that on that same morning defendant redeemed lottery tickets known to have been stolen from the store. The jury was entitled to reject defendant's testimony and to infer from this evidence that defendant committed the break-in and stole the tickets. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

Defendant has not shown that had counsel requested and received an instruction on the lesser offense of receiving or concealing stolen property it is reasonably probable that the result of the proceedings would have been different. *Carbin, supra*. He has not overcome the presumption that counsel rendered effective assistance. *Rockey, supra*.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Michael J. Talbot